been only for the purpose of impressing upon the mind of the petitioner that she was in danger of losing all except a small amount unless she submitted to the wishes of the O'Brien brothers. The plan finally succeeded. The purpose of the conspiracy was finally accomplished by the insurance threat, by the statement they would have the last will construed to mean only personal effects, by the statement that she would only receive a dower in real estate owned by the partnership, by the statement that they would incorporate the company and freeze out John A. O'Brien's interest, by the statement that John A. O'Brien's interest would have to bear the proportionate part of an expected judgment against Edwin J. O'Brien, Jr., in the National Bank of Kentucky litigation, and finally by the concealment of material facts relating to the value and by misrepresentation of what the actual value of the company was, they caused her to unwillingly remove herself from the position of a silent partner in the Edward J. O'Brien & Company, a position which would have permitted her to enjoy the profits of this company for a period of five years, and to unwillingly sell to the O'Brien brothers, by and through James O'Brien, the interest of her deceased husband in this company, for $380,000.00 when they knew that the interest was worth at least the undisputed value in the record of $723,000.00. It is true that before this agreement was consummated the petitioner was represented by counsel. As to what transpired at the conference, according to the testimony of L. R. Curtis, an attorney, and one of the witnesses on John A. O'Brien's

last will and insurance trust agreement revocation, said:

> The incorporation of the company, as a matter of fact, I thought that—it is impressed upon my mind very clearly—was exactly what would be done, if a trade was not made, and she would be frozen out, as a matter of fact. (Tr., Vol. 7, p. 804, q. 62.)

It is true that an auditor was present at the different conferences relating to the consummation of the sale of petitioner's interest in the partnership. This auditor was there for the purpose of making an audit if petitioner had been granted permission, but this permission was never granted. This auditor at the time of these conferences was employed by the firm of Ernst & Ernst, while at the trial he was a Certified Public Accountant employed by the United States Government.

As to what transpired at the conference just before the contract for the sale of the interest was signed, Mr. Wirotzious testified:

> She was taking an awful whipping over there that day. I really felt sorry for her, but there wasn't anything I could do. Mrs. O'Brien sat over there at one side of the room and she said a dozen times or more "I don't want to sell my interest. Why should I take my money out of that company, where I am getting a good return, to invest it in something that is not so good? I want to stay in." (Tr., R., Vol. 2, p. 223, q. 68; p. 225½, q. 80.)

As to the circumstances under which this contract was concluded, this same witness (Wirotzious) stated:

> At the conference, there was the same general threat at that time of incorporating the company, freezing out her interest, and they told her at that time she wouldn't get more than $100,000 for her interest. There was the same threat made at that particular meeting where it was stated that they would sue on the insurance trust agreement and would win on it unless she would sign away her interest. She said, "How do I know you have the insurance releases if I sign this paper?" Mr. George Caldwell, Vice President of the Louisville Trust Company, said, "They are right here in this pocket." Mrs. O'Brien said "Can I see them?" and at that time Mr. George Caldwell said "I will show them to your attorney, but I will not show them to you." Those things were very definitely fixed in my mind because of the treatment accorded a woman by a bunch of men whom I thought were gentlemen. I had never seen anything like that. It makes my blood boil every time I think of it. (Tr., R., Vol. 2, p. 226, answer to q. 82.)

We have set out the above facts in order that the Court may understand under what circumstances the petitioner lived during her marriage to John A. O'Brien and under what circumstances her husband died and the circumstances from the date of his death that led up to the signing of the agreement for the sale of petitioner's interest in the Edward J. O'Brien & Company.

In reply to that part of respondents' brief on page 7 which quotes from the opinion of the Court of Appeals in regard to the conduct of the trial judge, and especially to that part of the brief and opinion which refers to the patience of that judge, we desire to call the Court's attention to this same chancellor's conduct during the trial in the Chancery Court of Jefferson County. The original action was filed in the Jefferson Circuit Court for the purpose of setting aside this agreement. The original petition was prepared by Hon. E. C. O'Rear, twice Chief Justice of the Court of Appeals of Kentucky. In March, 1938, the Chancellor announced, apparently on his own motion:

> The Court is of the opinion that petition does not state a cause of action, and it is ordered by the Court that this action be remanded. Plaintiff is hereby given leave to reform, but not to amend, her pleadings. (Tr. R., Vol. 1, p. 70-73.)

We would likewise refer to the comment of the Court on the petition of that highly respected lawyer and former Judge of the Court of Appeals of Kentucky, in which the Chancellor said, in substance:

> I want to pay my respects to that document. It is a most iniquitous pleading, and shrewdly and cleverly drawn for the purpose of confusing. (Tr., Vol. 24, p. 26-27.)

Then on March 17, 1938, the record shows the Chancellor wrote this:

> The Court is of the opinion that the petition does not state a cause of action, remands the case.

> Plaintiff given leave to reform, but not to amend, her pleadings. The Court of the opinion that the petition violates every canon of good draftsmanship, and of the further opinion that plaintiff's lawyers know better, declines to allow so deliberately barbarous a piece of legal work to be patched up. Replead, but not amend. (Tr. R., Vol. 1, p. 73.)

This was written of Judge E. C. O'Rear, who for two terms as a Judge of the Court of Appeals of Kentucky, and twice its Chief Justice, wrote some of the ablest opinions ever written by a Judge of that Court. He is convicted by the Chancellor of a willful, deliberately barbarous, and iniquitous piece of legal work in the drafting of the petition.

Comparable to the above remarks relating to the Honorable E. C. O'Rear is the description by the Chancellor of Mrs. John A O'Brien, the petitioner in this case, as having, because of her ignorance and inexperience, baited a trap for the O'Brien brothers, who were men of long and successful business experience. In the opinion at the conclusion of the trial the lower Court wrote:

> Shall equity allow a trap to be baited with apparent satisfaction and sprung by injured innocence? (Tr. R., Vol. 3, p. 402.)

Thus, ignorance and inexperience, and indeed the innocence of the litigant, is inverted, and is pictured as a trap for the successful, the influential and powerful.

The Court recognizes the duty of full and complete disclosure, and yet in his opinion (Tr. R., Vol. 3, p.

385) finds that no relation of confidence existed between the parties, saying:

> All that is out, and I am not going to bother with it.

The Chancellor, when the petition was reformed, and when the reformed petition attempted to adopt the allegations of the original petition by reference, took his pen and of his own volition struck out this portion of the reformed petition. Likewise, he struck out the word "concealment," and in lieu thereof in his own hand substituted the word "undisclosed." As to undisclosure, the Chancellor found that Mrs. O'Brien was guilty of bad faith in not seeing to it that the defendants O'Brien disclosed to her what was in their power to reveal to her. Is it possible that the Chancellor distrusts ignorance and inexperience, and exalts the shrewd, the successful and the powerful, just as he convicts the Honorable E. C. O'Rear of a willful, deliberately barbarous and iniquitous piece of legal work in the drafting of the original petition?

The Chancellor who had made these comments about an able lawyer and a litigant in his Court, during the trial of the case, when material and relevant and competent evidence was being introduced on the subject of Mrs. Patricia O'Brien's having to borrow money to live on while her insurance money was being held up by the O'Briens, arose from the bench and said:

> You can go ahead and put that in as far as I am concerned, I am going out to get myself a cup of coffee. I won't listen to any more of it. I won't

> listen to any more about that woman, I mean Mrs. O'Brien, borrowing money. (Tr., Vol. 3, pp. 319, 324, Exhibit 34.)

and proceeded to walk from the court room, leaving the trial in grogress.

The petitioner was confronted with every obstacle not only in the consummation of the agreement, but in the litigation which resulted therefrom as well.

In reply to respondents' brief, page 24, in regard to the Chancellor's rulings, he held that John A. O'Brien was fully competent to make a will on July 7, 1933, but intimated that there was serious doubts as to his mental competency to make the will of September 22, 1933, although Dr. Heman Humphrey, the family physician and a first cousin of the Chancellor, and L. R. Curtis, a Louisville lawyer, both testified without reservation that John A O'Brien was fully competent to make the September 22, 1933, will, and was competent up until the date of his death on January 1, 1934, and there is no testimony to refute the statement of these two witnesses, nor the statement of Dr. Overstreet, another physician, who attended John A. O'Brien during the entire time he was ill. Dr. Humphrey and Mr. Curtis witnessed the September 22, 1933, will and all insurance trust agreement revocations. (Tr., Vol. 7, p. 749, q. 17; p. 838, q. 17.)

ARGUMENT.

DENIAL OF PETITIONER'S MOTION FOR SUBPOENA DUCES TECUM.

In reply to that part of respondents' brief on page 12 as to what records were in the possession of the petitioner and her counselors and advisors, this record discloses that Edward P. Humphrey, petitioner's attorney, in making the settlement, George G. Caldwell and J. G. McPherson, co-administrators, testified that all they had during the negotiations to settle on was the 1933 and 1934 audits of the Edward J. O'Brien & Company, and Exhibit 22; that they never at any time during negotiations saw any subsidiary audits or any appraisals either of the Edward J. O'Brien & Company or the subsidiaries, and that they never at any time had any prior year audits. In support of this statement, we desire to quote from the testimony of Edward P. Humphrey, J. G. McPherson and George G. Caldwell.

Mr. McPherson, one of the co-administrators, and Vice President of the Fidelity & Columbia Trust Company, admits that he never had any records of the Edward J. O'Brien & Company from which to figure values, except the audits of 1933 and 1934, and Exhibit 22 (Tr., Vol. 16, pp. 1614; Vol. 19, pp. 1769, 1770).

Mr. McPherson was asked this question (Tr., Vol. 19, pp. 1774-1775, q. 14):

> What steps did you take to find out whether the figure of $425,000 was correct or whether it was of greater value, taking in consideration market

value, appraised values, upon physical assets, property, plant and equipment, and tobacco inventory and the rest?

His answer was "None."

This witness was asked by Judge Humphrey:

If you had known that the O'Briens had falsified their information and that the partnership interest should have had a book value of $800,000.00, would you have considered $380,000.00 a fair value?

His answer was "By no means" (Tr., Vol. 17, pp. 1629-1630).

George G. Caldwell, Vice President of the Louisville Trust Company, which was one of the co-administrators, in response as to what audits he had in his possession prior to the time his Trust Company approved the sale, said (Vol. 19, p. 1789):

Q. 47. So at no time did you have either the subsidiary audits or access to them in any way while this deal was pending for the sale of John A. O'Brien's interest or share in the partnership of the E. J. O'Brien & Company?

A. I don't know about access to them. We did not have them, at least I did not have them.

Q. 48. I don't want to quibble with you about words, but did you see them or have them or have them made available to you prior to that time?

A. No.

Caldwell stated that (Tr., Vol. 16, pp. 1537, 1538) except for the 1933 and 1934 audits and Exhibit 22, which shows the figure of $425,649.45, he had no further information. He made no investigation of excessive depreciation (Tr., Vol. 19, p. 1779). He made no investigation of the tobacco inventory of O'Brien & Company or its subsidiaries (Tr., Vol. 19, p. 1782). Caldwell affirms (Tr., Vol. 19, p. 1790) that Judge Humphrey's statement of his testimony is correct, to this effect:

> I think it is clear that the witness (George Caldwell) did not have them and he did not know of anybody else having them, that is, anybody else including the Fidelity & Columbia Trust Company, Patricia O'Brien or any of her professional representatives or any of her friendly advisers. I think that is what the witness says.
> Q. 52. Is that a correct statement, do you adopt that?
>
> A. That is correct (by Caldwell).

Although it is true she was represented by administrator and attorneys, the record above shows that neither the attorneys nor the administrators made any investigation to ascertain whether the amount of $425,000 represented on Exhibit 22 was the correct market value of John A. O'Brien's partnership interest.

Ed P. Humphrey describes the reason for his approval:

> There never would have been any trade if we had ever been convinced that the interest in the partnership was worth anything like the figure I was

> named. (This was $850,000.) I think I can clear it all up by saying we accepted this value of $425,000 as the basis of the negotiations, and relied on the books as being correct. (Tr., Vol. 15, pp. 1456, 1457.)

On pages 1415, 1416, Tr., Vol. 15, Ed Humphrey says:

> I told him I did not know anything about that, but I assumed they put down on the books what they thought they were worth. (He is here speaking of the subsidiaries.)

Again on page 1421, Tr., Vol. 15, Ed Humphrey says:

> No, Judge, I examined those audits (referring to 1933 and 1934) with her when she first brought them in. I cannot say I analyzed them, but I examined them, but when she employed an expert auditor of Ernst & Ernst to conduct her examination of the O'Briens' accounts, so far as she intended to have that made I felt like I was relieved of the responsibility of checking those figures.

Wirotzious (Tr., R. Vol. 2, p. 198) said:

> I told Mrs. O'Brien on several occasions subsequently that it was not possible for me to take an audit report prepared by some other auditor and say that it was right or wrong. That the only way in which I could determine the correctness or incorrectness of the report would be to make an examination myself or for my associates to make an examination.

This same witness (Tr., R. Vol. 2, p. 222, answer to q. 67) said:

> She asked that she be permitted to have the books of the Edward J. O'Brien & Company audited from the date of Edward J. O'Brien, Sr.'s death in 1928 up to the date of the proposed sale, which would have taken us up to November 5th or November 15th, 1935, which is right close to the date, as reflected in the 1935 audit report, of the sale of her partnership interest.

Again this witness stated (Tr., R., Vol. 2, p. 223):

> She said "I want an audit made. I am willing to pay for it." And further, it was always my understanding that she wanted to pay for the audit because on the occasions that I talked with her, my firm rendered a bill to her and she paid it out of her personal funds.

The testimony quoted above refutes entirely the statements made in respondents' brief on page 12, as well as the opinion of the Court of Appeals as to what audits the petitioner had before her rather than the information claimed to have been in her possession by respondents as set out as A, B, and C on this page. It also shows she was denied the right to have an audit made, contrary to statements in respondents' brief, page 13.

In the trial court, petitioner filed in support of her motion for subpoena *duces tecum* the affidavit of Hugh A. White, a Certified Public Accountant and a senior member of the firm of White, Bower & Prevo of De-

troit, Michigan. This affidavit is found in Tr., R. Vol. 3, pp. 261, 262. In this affidavit this accountant says that he has also been called upon to advise plaintiff and her counsel with respect to proper accounting methods and practices which should be employed in obtaining adequate information upon which to base competent testimony in support of plaintiff's petition in this cause; that deponent has made a study of various documents, papers, letters, and memorandum furnished to him by plaintiff and her counsel and has been engaged in a review of these documents for the purpose of furnishing an accurate analysis reflecting the true value of the interest of the estate of John A. O'Brien, deceased, in the partnership of E. J. O'Brien & Company during the aforesaid period 1931 to 1935, and also up to the end of the five-year period following the death of John A. O'Brien.

On page 268 of this affidavit, deponent says:

> It is necessary to see all of the books, records and disbursements of original entry, and particularly the general ledger, private ledger, cash receipts and cash disbursements records . . .

Under Rule 34 of the new Federal Rules of Civil procedure quoted in respondents' brief, page 15, upon proper showing a party may require the production of documents. In this case we have shown that petitioner at the time the contract was signed did not have in her possession any documents that showed the condition of the Edward J. O'Brien & Company, and the witnesses in this case whose testimony we have quoted show that the only way that the true picture of the condition of

the company could be ascertained was from an examination of the records requested by petitioner, and therefore in denying petitioner these records it not only violated the due process clause of the Constitution, but also violated section 528 of the Kentucky Code of Practice as well as this rule.

On page 17 of respondents' brief there is set out the ruling of the Chancellor on petitioner's motion for subpoena *duces tecum*. What petitioner had at the trial was little more than what was before her at the conference during negotiations. This is fully answered in our supporting brief filed with the petition for writ of certiorari on pages 33 to 37.

On page 25 of respondents' brief they quote from the Chancellor's finding of facts that respondents furnished to petitioner all the information in their possession. In reply to that part of this brief we desire to call the Court's attention to the following items which were not considered by either the trial court or the Court of Appeals.

The Court of Appeals' opinion in passing on the law as to dealings between partners, says:

> Specifically in the exercise of their duty the purchasers of the interest of John A. O'Brien in the partnership were obliged to deal fairly with Mrs. O'Brien and voluntarily disclose full and accurate information concerning the business, its affairs and values. Their duty was not passive. It was active.

Since the retention of the opinion by the Court of Appeals in this case, the same doctrine was upheld by

the Court of Appeals of Kentucky in Miles v. Ashby, 174 S. W. (2d) 753.

Under the authority of these cases, each partner is the confidential agent of the other. Each is entitled to a full disclosure of all material facts within the knowledge of the others relating to the partnership affairs.

Under Article VI of the partnership agreement, it is provided:

> In the event the estate elects to withdraw from the partnership at the expiration of Five (5) years, then the interest of said decedent shall be the value of the interest, as shown by the books of the company, or by appraisement, plus profits and interest if any.

The respondents in this case had full knowledge of all of the affairs of the partnership. They were in possession of all of the records of the partnership. The petitioner not only was unfamiliar with the affairs of the partnership but she was unfamiliar with the manner in which the business was being conducted at the time of the purchase. Under the law she was entitled to a full disclosure not only of the affairs, but is entitled to have the original books of entry disclosed either to her or to those representing her in a transaction of this character. Without being afforded this opportunity she was compelled almost by force and if not by force, at least by threats at the time the contract was signed. The force began prior to the death of her husband when he was confined in the home of one of his brothers without his wife, the petitioner in this

case, being able to see him. The petitioner was threatened with a dissolution of the partnership and the formation of a corporation. She was threatened with a suit to have the will of her husband construed as to whether that will devised to her only the household effects or his entire personal estate.

It was under such circumstances that the contract was finally consummated between the petitioner and the respondents. The basis for the settlement was determined from Exhibit 22 which was prepared by the respondents.

PLAINTIFF'S EXHIBIT 22.

(Given Plaintiff to settle on)

Present Interest		$425,649.45
Real Estate	$331,873.95	
Pro Rata based on capital	23.77%	78,886.44
		$346,763.01
Her ⅓ Life Interest Real Estate 23¼% of $78,886.44		18,341.10
		$365,104.11
Depreciate wholly owned subsidiaries 50% 252,500 at 50%—$126,250 at 23.77%		30,009.62
		$335,094.49
Remainder Interest in $50,000 Life Ins.		17,500.00
		$317,594.49
½		$158,797.25

In the preparation of this exhibit no consideration was given to the following items:

John A. O'Brien's Share of the 1935 Profits of the Edward J. O'Brien & Company, Amounting to $17,185.07.

An examination of the opinion of the Court of Appeals of Kentucky revealed that the sole reason for denying a recovery of John A. O'Brien's share in the profits made for the year 1935 was:

> It appears that the profits could not be definitely ascertained until the end of the fiscal year, November 30, after inventories had been taken.

It is true that profits could not have been accurately determined until the end of the fiscal year which ended on November 30, 1935. The contract was signed on November 15, 1935. According to the testimony of Edwin J. O'Brien, Jr. (Tr., Vol. 13, pp. 1169-1171), the profits for the entire year could have been ascertained in from three to five days. As a matter of fact, an inventory was taken on July 1st and on September 1, 1935, and therefore the profits could have been ascertained at that time.

The amount of this item is not disputed. The fact that this item was not disclosed is not disputed. The opinion of the Court of Appeals, however, disallowed this item because petitioner waived her right to disclosure of the 1935 profits under her contract of acceptance. Certainly a person should not be bound by an acceptance of something concerning which she had no knowledge.

The record discloses that Mrs. O'Brien, the petitioner, was informed that there were no profits nor in-

creases for 1935, and that the Edward J. O'Brien & Company had operated at a loss. This is shown by the testimony of Mrs. O'Brien, Mr. Wirotzious, Mrs. Blickenstaff, and Mr. Shonkwiler (Tr., Vol. 6, pp. 646, 647, 709; and Vol. 7, p. 723). On this point Mr. Wirotzious testified as follows:

> It was late in the year, for the year ended November 30, 1935. In other words, approximately eleven months of the fiscal year had expired and they were apparently—the partnership was in position to know the profits for the period and Mrs. O'Brien asked at that time what the dividend would be for the year up to the time they were asking her to sell. Mr. Barker said "There are no profits this year, we made a loss."

The O'Briens knew the amount of profits made by the company at the time the contract was made, and certainly they knew the exact amount of the profits for the year 1935 when the contract was finally concluded. The contract was not concluded until February 1936, and yet during all of this time prior to and after the contract was signed, the petitioner had no knowledge of this item of profit. No one can be said to have waived that which he did not know. (67 C. J., p. 299, Sec. 5.)

If petitioner had been given an opportunity to examine the records which she requested of the trial court, then she would have been in a position to know the exact status of the affairs of the company, and with this knowledge she would then have been in a position to deal fairly with the O'Briens. Under the partner-

ship agreement she was entitled to these profits. Under the law it was the duty of the respondents to disclose the fact that a profit had been made in 1935, but without the records she had no opportunity to ascertain this fact.

Petitioner Was Entitled to John A. O'Brien's Share of the Excess of the Book Value of the Subsidiaries Over the Value Thereof as Shown on the Books of the Edward J. O'Brien & Company Which Represents the 1935 Profits of These Subsidiaries—$5,697.47.

What has been said in regard to the profits made during the year 1935 of the Edward J. O'Brien & Company appears with equal force as to this item. The failure to disclose its value was even a more flagrant breach of the duty of the O'Briens. They represented on Exhibit 22 that the subsidiaries were worth only fifty per cent of their 1934, not 1935 book value as shown on the books of the Edward J. O'Brien & Company. This item had been definitely determined prior to the signing of the contract with the petitioner.

The fiscal year of the subsidiaries ended on October 31st of each year, and the audit of these subsidiaries for the year 1935 had already been made, and this audit showed a net profit of $24,108.41. And yet the petitioner was compelled to accept the representations made by the respondents as to the value of these subsidiaries without being given an opportunity of ascertaining what the real facts were in regard to the actual value.

The Edward J. O'Brien & Company wholly owns various subsidiaries, and these subsidiaries were worth at least the book value rather than fifty per cent of the book value, as contended by the respondents. Again, this information was in possession of the respondents, and the petitioner had no information as to these values, and under the ruling of the trial judge, was denied an inspection of the original records for the purpose of finding out whether or not the O'Briens were making a full disclosure of all of the assets.

Petitioner Is Entitled to John A. O'Brien's Share as to the Increase in the Value of the Securities Held by the Edward J. O'Brien & Company—$22,262.06.

The Court of Appeals of Kentucky in refusing to allow this item, although admitting it was respondents' duty to disclose full and accurate information as to partnership values, yet this opinion holds that the partners do not have to disclose the value of securities held by the firm because the petitioner could by her own investigation have ascertained the value of these securities.

Where a fact is misrepresented or where one of the persons has this particular information and fails to divulge it to the person with whom he is dealing, and the person that does not possess this information acts on the statements of the other, the person deceived or misled has the right to have a Court of Equity correct a contract concluded under such circumstances.

Because of the relationship between the contracting parties and the failure of the court to compel a full disclosure, amounts to a denial to the petitioner of equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Petitioner Was Entitled to John A. O'Brien's Share of the Excess of Appraised Over the Book Value of the Property, Plant and Equipment of the Subsidiary Companies for 1935—$8,890.51.

The Court of Appeals in its opinion denied a recovery on this item upon the theory that there was an election to sell on book values while it is undisputed that the appraised values of the subsidiaries exceeded the book value by $41,837.20. This amount was never disclosed. The value of John A. O'Brien's share of this item is the amount set out above. The respondents never disclosed any records or gave any information other than book value. Then they proceeded to advance claims that the real value was less than the book value. The modified opinion of the Court of Appeals intimates that respondents furnished to petitioner and her advisors a 1935 appraisal of the Edward J. O'Brien & Company. The record conclusively refutes such belief (Caldwell, Tr., Vol. 19, pp. 1779-1789; McPherson, Tr., Vol. 17, pp. 1614, 1629-1630; Vol. 19, pp. 1769, 1774, 1775; Humphrey, Tr., Vol. 15, pp. 1421, 1456, 1457). If the Court insists that the partnership interest was purchased on the basis of book value, then pe-

titioner was entitled to disclosure of such book value. Respondents knew when the contract was signed in 1935 that the book value of the subsidiaries as of June, 1935, was $307,500.00, and not one-half or fifty per cent of $252,500.00, or $126,250.00 (Exhibits 60, 61, 62, 63, 22). This item alone makes a difference of $181,250.00 in value misrepresented by the respondents.

Petitioner Was Entitled to John A. O'Brien's Share of the interest on Edwin J. O'Brien's Capital Deficiency and Overdraft—$36,477.70.

The records in this case disclose that Edwin J. O'Brien, Jr., withdrew from the firm all of his capital, interest in the partnership plus an overdraft of $144,000.00, and yet in the negotiations of the settlement with the petitioner she received no accounting for the interest on any part of this overdraft.

Mr. McPherson, Vice President of the Fidelity & Columbia Trust Company, one of the co-administrators, and Mr. Richardson, the auditor of the Edward J. O'Brien & Company, as well as Mr. Hugh A. White, an auditor, admit that from the 1934 audit of the Edward J. O'Brien & Company the last audit upon which the settlement was based, it could not be determined whether or not any interest was charged on Edwin J. O'Brien, Jr.'s capital deficiency and overdraft. (Tr., Vol. 17, pp. 1622-1623; Vol. 17, pp. 1624-1625; Vol. 20, p. 1886.)

These five items amount to the total sum of $90,-512.81. Yet for the entire period from November 30,

1934, to November 15, 1935, neither the petitioner nor any of her representatives were told a thing as to profits, depreciation or increases in the assets of the partnership. This record discloses that respondents failed to deal fairly with petitioner and that under the rulings of the trial court, she was denied her motion for subpoena *duces tecum* and by such denial could not obtain information sufficient to base or form an opinion as to the value of her interest in the partnership.

Goodwill.

In attempting to arrive at the value of the interest of John A. O'Brien in the partnership, no valuation was placed on the goodwill of the firm. This partnership had been in existence since 1880. Again we say that the value of goodwill cannot be established without the records asked for before the trial judge.

Goodwill means benefits which arise from the establishment of a particular trade or occupation. This advantage or benefit acquired by an establishment is something that is beyond the mere value of the capital, stocks, and other property of the firm or corporation. It has a value because of the reputation for affluence, or punctuality, or the character of merchandise sold. (Storey, Partnership, paragraph 99, 16 A. J. 87.)

Goodwill of a business is a valuable right of property. (2 V. E. S. and B 218, 16 Harvard LR 135.) Goodwill may be mortgaged, assigned or taken in execution in connection with a business. (39 L. JCHN 579.) Goodwill passes under a general assignment for

the benefit of creditors. (Wilmer v. Thomas, 13 LRA 380.) The purchaser of goodwill and a firm name is entitled to the advantages of the business. Goodwill may be assessed for taxes. When a partner retires from a firm assenting to or acquiescing in the retention by the other parties in the possession of the old place of business and the future conduct of business by them under the name, then that name remains with the purchaser. (Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. Rep. 143.)

The petitioner in this case was not familiar with the value of this asset.

The Court of Appeals in its opinion sets out that the petitioner and her representatives had possession of the 1934 audit of the Edward J. O'Brien & Company made by a competent firm which showed not only the condition of the business, but the various assets owned by the firm.

> This purported statement or audit was not one made for the purpose of selling the business but one made for the purpose of making an income tax return. According to the testimony of Hugh A. White of the firm of White, Bower & Prevo of Detroit, neither this audit or the audits made available to petitioner at the trial were of the kind such as to form a basis of a settlement between partners. (Tr., Vol. 20, pp. 1897, 1898, 1899, 1900, 1901.)

An audit for income tax purposes, as is well known, takes every kind of deduction as it is possible to make. Therefore, the audits, if they were audits at all, were

not the proper kind upon which to base an opinion as to the real condition of the firm. The only way that the true condition could be determined was by an audit made from an inspection of the records of original entry. This was denied to the petitioner by the trial judge. By such a denial the petitioner was denied the principle of right and justice guaranteed to her under the due process clause of the Fourteenth Amendment.

By the failure of the court to consider any of the items set forth above, it amounted to an arbitrary and capricious exercise of power by which the petitioner was stripped of all real remedy, and is wholly at variance with the spirit of the Constitution in depriving her of her property rights.

This court in Truax v. Corrigan, 257 U. S. 312, in determining what are the rights guaranteed under the Fourteenth Amendment, said:

> It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy.

In the case of Meredith v. City of Winter Haven, 64 S. Ct., p. 11, the Court said:

> In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. Commonwealth T. Co. v. Bradford, 297 U. S. 613, 618, 56 S. Ct. 600, 601, 80 L. Ed. 920; Risty v. Chicago, R. I. & P. R. Co., 270 U. S. 378, 398, 46 S. Ct. 236, 240, 70 L. Ed. 641; Kline v. Burke Const. Co., 260 U. S. 226, 234, 235, 43 S. Ct. 79, 82, 83, 67 L. Ed. 226, 24 A. L. R. 1077; McClellan v. Carland, 217 U. S. 268, 281, 282, 30 S. Ct. 501, 504, 505, 54 L. Ed. 762. When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.

An opportunity for a fair hearing is one of the essential elements of due process where it is necessary for the protection of the parties. No man should be punished or deprived of his property rights without an opportunity of being heard. No one may be legally divested of his property rights unless he is allowed a hearing before an impartial tribunal. And, in addition to this, he must have an opportunity to contest the claim set up against him, and be allowed to meet it on the law and facts for the purpose of showing whether or not it is unfounded. A full hearing is where

one has ample opportunity by evidence and argument to fairly show his or her side of the controversy. There is no hearing when the party is not given an opportunity to examine the evidence. Such a hearing is a matter of right, and when denied it violates one of the essential elements of due process. (Turpin v. Lemon, 187 U. S. 51, 47 L. Ed. 70, 23 S. Ct. 20.) (Hovey v. Elliott, 167 U. S. 409, 42 L. Ed. 215, 17 S. Ct. 841.) (12 A. J., Sec. 607, p. 301.) (George Moore Ice Cream Co. v. Rose, 289 U. S. 373, 77 L. Ed. 1265, 53 S. Ct. 620.) (American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 341, 53 S. Ct. 98.) (Interstate Commission v. L. & N. Railroad Co., 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185.)

Due process under the provisions of the Fourteenth Amendment embraces the right of a person to be free not only from physical restraint, but also in the enjoyment of all of his faculties. (Grosjean v. American Press Co., 297 U. S. 233, 80 L. Ed. 660, 56 S. Ct. 444.)

Due process of law requires an ordinary proceeding adapted to the nature of the case, in which proceeding the citizen has the right for an opportunity to be heard by establishing any fact which under the law would be a protection to him or to his property. (13 C. J., p. 2345, para. 1009.)

"Day in Court" means the right of a party to introduce evidence, and any judgment which is rendered without these modes of procedure or in disregard of them is not due process of law. A subpoena *duces tecum* is due process where it appears that the books and papers sought for are relevant and material to the

matter under consideration. (C. J., Note p. 1237, para. 1011.)

The matter under consideration in the trial before the Judge of the Chancery Court of Jefferson County was the value of the interest of the petitioner in the Edward J. O'Brien & Company. There was no way that the value of this interest could be determined without an opportunity to inspect the records of the company. She proceeded in an orderly way for the purpose of securing this necessary proof. She applied for a subpoena *duces tecum* as provided by the Civil Code of Kentucky. She was denied the right and thereby deprived of a valuable interest in the firm. This was a property right. (Campbell v. Holt, 115 U. S. 620.) (Tyson & Bros. v. Blanton, 273 U. S. 418, 47 S. Ct. Rep. 426.)

In the opinion of the Court of Appeals of Kentucky, several cases are cited in support of its holding that there was no violation of the Fourteenth Amendment to the Constitution. One of these cases is Stephenson v. Kirtley, 269 U. S. 163. That opinion, however, merely holds that the effort to perfect an appeal to the Supreme Court was a collateral proceeding to set aside a judgment of a Court of General Jurisdiction. Certainly this opinion has no bearing on the question involved in the case at bar.

Another case is *Ex parte Converse,* 137 U. S. 624, but this case relates to the denial of a writ of *habeas corpus,* but in this opinion the court holds that it is a violation of the Fourteenth Amendment if a party

is deprived of her property by any arbitrary power, or is arbitrarily deprived of her property.

In the case of Arrowsmith v. Harmoning, 118 U. S. 194, cited in the opinion, it merely holds that the Supreme Court could not take jurisdiction or reverse a case where the State court had merely made an erroneous decision. We agree that if petitioner had been given an opportunity to present all of her facts, and then after having had this opportunity the State court had decided the facts against her, this court, under such circumstances, would not have jurisdiction.

In the case of Jones v. Buffalo Creek Coal & Coke Co., 245 U. S. 328, cited in the Court of Appeals' opinion, it is held that a person is not deprived of due process by the admission of incompetent evidence. The natural inference to be drawn from this decision is that if the party had been deprived of competent evidence then perhaps the court might take a different view of whether or not the Fourteenth Amendment had been violated.

Respondents, in their brief, cite American Railway Express v. Commonwealth, 273 U. S. 269, and in this case it is held that a merely erroneous decision given by a State court in the regular course of judicial proceedings does not deprive the unsuccessful party of property under due process of law. Then this opinion holds that there was nothing in the record that disclosed that there was anything arbitrary or contrary to the fundamental principles of justice. This opinion, as we construe it, holds that this court cannot interfere unless the judgment amounts to arbitrary or

capricious exercise of power, or is in clear conflict with those fundamental principles. In this case, as we contend, the record does disclose that the court arbitrarily deprived the petitioner of her right to introduce proof, that the trial court arbitrarily deprived her of her right to show as to the value of her interest in the Edward J. O'Brien & Company.

Another case cited by respondents is that of Cincinnati, N. O. & T. P. R. Co. v. Commonwealth of Kentucky, 115 U. S. 321. In this case the court holds that under the Statutes of Kentucky, a railroad company had the right to introduce proof before the franchise board as to the value of its assets; that it did introduce proof; that under the statutes it was given the right to appeal; and, therefore, it was not deprived of any of its rights under the Fourteenth Amendment. This opinion certainly has no bearing on the case at bar.

Also cited by respondent was Pittsburg, Cincinnati &c. Railway v. Backus, 154 U. S. 421. In this case the court says:

A hearing before judgment with full opportunity to present all the evidence and the arguments which the party deems important is all that can be adjudged vital. One hearing, if ample before judgment, satisfies the demand of the Constitution in this respect. If petitioner has been given an opportunity to present her evidence, and then on this evidence if the court had made an adverse decision, there would have been no violation, but by being deprived of the right to in-

troduce evidence under this authority she was denied her rights under this amendment.

Respondents cite the case of Union Trust Company v. Garnett, 254 Ky. 573 in support of their argument that the trial court acted within his discretion in denying the motion for subpoena *duces tecum*. In the Union Trust Company case a suit was pending before the Hon. James Garnett, the Judge of one of the Chancery Courts in Jefferson County, Kentucky. An affidavit was filed in support of a motion for subpoena *duces tecum* to require the First National Bank of Falmouth to produce checks and the records showing the deposits of a number of their customers from 1921 to 1934. The court denied this motion, and the opinion in this case shows:

If counsel for plaintiff will prepare a motion setting forth the records which he believes are competent evidence to be heard on the trial of the action, the court, if convinced such records are material, will require the witness to produce them.

The Court of Appeals, in explaining the judgment, said:

> It was necessary for Logan and Hubbard to file, in support of their motions, an affidavit or some trustworthy statement satisfactory to the court, identifying with reasonable certainty the things desired to be included in the subpoenas *duces tecum*, for without such, on an appeal from the court's dverse ruling, it could not be determined by this court whether they had been thereby deprived of competent, material evidence, obtainable by the procedure.

In this case an affidavit was filed by a competent accountant. The only way that he could pass on the value of the assets of the company was by an examination of the books of original entry. The trial court overruled this motion. Without these records the plaintiff was deprived of her "day in court" because without proof to show the incorrectness of Exhibit 22 she could not establish her claim.

The case of Corry v. Campbell, 154 U. S. 629, cited in respondent's brief is merely a case that holds that this court has no right to correct errors of a State court made in regard to assessments made by a municipality.

The case of Castillo v. McConnico, 168 U. S. 674, cited in respondent's brief holds that when a State court decides a particular formality was not essential, it presents no Federal question, provided it does not violate the Constitution by depriving of property without due process of law. Conversely, if such ruling does deprive of personal property without due process, then this Court does have jurisdiction.

Respondents contend that the trial court and the Court of Appeals held that there were no misrepresentations nor were there any concealments, nor did they fail to disclose the facts. Our answer to that is that the trial court denied petitioner the right to show misrepresentation and concealment of facts. The audits exhibited, it will be recalled, were delivered at 10 a. m. and returned to respondents at 3 p. m. on the same day. The audits that were in the possession of the attorneys and co-administrators acting for the petitioner were

audits made for income tax purposes only, and certainly we all know that there is a difference between audits made for this purpose and audits made to show the true condition of the company. It is contended that the petitioner had an opportunity to have an audit made before the contract was signed. The witness E. C. Wirotzious (Tr. R., Vol. 2, p. 222, answer to q. 67), states:

> She asked that she be permitted to have the books of the E. J. O'Brien Company audited from the date of Mr. Edward J. O'Brien's Sr.'s death in 1928 up to the date of the proposed sale.

Again this witness stated (Tr., R. Vol. 2, p. 223):

> She said "I want an audit made. I am willing to pay for it," and further it was always my understanding that she wanted to pay for the audit because on the occasions that I talked with her, my firm rendered a bill to her and she paid it out of her personal funds.

Therefore, she was demanding the right to have an audit made, and she was denied the right to this valuable information when the contract was signed. The contract was signed after she was denied the right to have an audit made and under the circumstances set out in this brief (Tr., Vol. 6, p. 649).

Again, we desire to reiterate that this petitioner, under a threat of having the will construed as personal effects, under a threat of a suit on the insurance trust agreement, under a threat to incorporate the company, and under a threat to be made liable for the indebted-

ness of one of the brothers of the firm, was compelled to sign the agreement selling her interest in the Edward J. O'Brien & Company. She was demanding that she have the right to settle her insurance separate from that of the sale of her interest in the Edward J. O'Brien & Company. She was denied this opportunity because of the threats. She demanded that an audit be made in order that the value of her interest might be determined, and this was refused to her. In the court, in an effort to set aside this contract, she was again denied the right to have an audit made in order that the court might determine whether she had been fraudulently deprived of her property.

CONCLUSION.

The opinion of the Court of Appeals admits that the Edward J. O'Brien & Company was one of the largest, if not the largest of its kind, in the world. It admits that the parties to the contract under consideration were not on equal footing. It admits that petitioner was a person inexperienced in affairs of business, while on the other hand this same opinion admits that the O'Brien brothers were strong business men, fully acquainted with all of the affairs of the company.

This same opinion held that petitioner was the sole beneficiary under her husband's will; that the O'Briens' claims of the proceeds of the insurance under the insurance trust agreement was a fanciful claim; that partnership real estate was personal property. The result of this opinion was:

1. That for the property, plant and equipment which the O'Briens admit cost one million dollars, petitioner was only given $18,000.00 as her dower interest;

2. On the tobacco inventory of $900,000.00 she was not given any part of the principal or allowed anything for profits;

3. On the goodwill of the firm which should amount to between $700,000.00 and $900,000.00, she was given no consideration; and

4. On the five other items as shown in our supporting brief on page 2, she received no consideration.

In view of the admissions in the opinion of the Court of Appeals, the amount involved and the manner in which the trial was conducted, we feel that petitioner was denied her fundamental rights and justice under the Fourteenth Amendment, and that she was stripped of her real remedy by purely arbitrary and capricious exercise of the power guaranteed to her.

The effect of such an opinion as was rendered in the state court was to establish a precedent for the bench and bar of the state of Kentucky heretofore condemned by every prior decision of that court and the courts of every other jurisdiction.

We again respectfully submit that the writ of certiorari should be granted and the judgment and opinion below reversed.

RODMAN W. KEENON,
KEENON, HUGUELET & ODEAR,
Counsel for Petitioner.

ALLEN PREWITT,
Frankfort, Ky.,
Of Counsel.

January 27, 1944.